

Victims of Crime with Disabilities in Ireland: Invisible Citizens within an Adversarial Paradigm of Justice

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Abstract

Victims of crime with disabilities experience the more general problems associated with victimhood in Ireland including under reporting, lack of information provision, lack of private areas in courtrooms, and delays in progressing complaints. Very often, however, the centrality of their outsider status is also more pronounced. They experience marginalisation at a number of different levels in the criminal process including policy emphasis, the specific commitments given by criminal justice agencies, the requirements of the adversarial process, the criminalisation of conduct which involves the exploitation of persons with disabilities, the language employed by the criminal law, and service provision. The purpose of this article is to document the "invisible" status of victims of crime with disabilities in the Irish criminal justice system and to provide examples of the variety of ways in which this marginality manifests itself.

Introduction

In the last three decades, the status of the crime victim in Ireland has gradually altered from being perceived as a "nonentity" or "hidden casualty" to a stakeholder whose interests and opinions matter.² Driven largely by an inclusionary logic—flowing from many streams—the Irish criminal process is increasingly accommodating the previously excluded voices of victims of crime. Crime victims are being anchored once again as key constituents in the criminal justice landscape and criminal justice agencies have to rework their relationships with them.

Victims of crime with disabilities have also benefitted from this broader inclusionary momentum. This increased accommodation includes a presumption in favour of giving evidence via a

television link in certain specified cases, the use of intermediaries, the removal of wigs and gowns, the use of video-recordings of statements as evidence in relation to certain offences, greater flexibility in the giving of victim impact statements, more relaxed identification practices, a less exclusionary approach regarding the competence of persons with intellectual disabilities to give evidence at trial, provision for the reception of unsworn evidence, the criminalisation of conduct which involves the exploitation of persons with disabilities, and the imposition of statutory obligations on service providers, such as the Courts Service, to provide information to people with disabilities and to make their premises accessible.

The protection of victims with disabilities has also occurred at EU level. Article 2 of the EU *Framework Decision* of 2001, for example, provides that "each Member State shall ensure that victims who are particularly vulnerable can benefit from specific treatment best suited to their circumstances". More recently, art.3(4) of the Council of Europe *Recommendation* (2006)(8) provides that States "should ensure that victims who are particularly vulnerable, either through their personal characteristics or through circumstances of the crime, can benefit from special measures best suited to their situation". A new draft European Union directive establishing minimum standards on the rights, support and protection of victims of crime³ requires that relevant criminal justice agencies in Member States establish a "consistent mechanism" for the individual assessment of all crime victims so as to take their personal circumstances properly into account. Once victims are identified as being vulnerable, appropriate measures should be taken at investigative, prosecutorial, and trial phases.

Despite the increased awareness of the needs and concerns of victims of crime, shortcomings in the

criminal justice system remain stubbornly persistent. These primarily relate to the provision of information to victims, underreporting, attrition rates, the lack of private areas in courts, delays in the system, the lack of opportunity to participate fully in the criminal process, and inadequate support services. Victims of crime with disabilities experience these more general problems. They also, however, experience additional hardships that are often excluded from mainstream debates about victims' needs. The purpose of this article is to document their more "invisible" status and to provide examples of the variety of ways in which this marginality manifests itself.

Accommodation for victims with disabilities

The adversarial nature of the Irish criminal process ordinarily requires that witnesses are examined *viva voce* in open court. In recognition, however, of the trauma that this may impose on victims of specified sexual or violent offences,⁴ s.13 of the Criminal Evidence Act 1992 (the "1992 Act") provides that victims, among other witnesses, can give evidence in such cases via a live television link. In the case of victims of such offences who are under the age of 18⁵ or are persons suffering from a "mental handicap" (s.19), there is a presumption in favour of giving evidence via television link (s.13(1)(a)). In all other cases, leave of the court is required (s.13(1)(b)).

The use of such a provision was contested in the Irish courts in the cases of both *Donnelly v Ireland*⁶ and *White v Ireland*⁷ on the grounds that it constituted an unlawful interference with an accused person's right to fairness of procedures. In neither case was the challenge successful. More recently, in *DO'D v Director of Public Prosecutions and Judge Patricia Ryan*,⁸ the applicant had been charged with having sexual relations with two mentally impaired persons. He sought leave to quash the order of the trial judge directing the use of video-link facilities pursuant to s.13(1)(b) of the 1992 Act. The applicant contended that the giving of evidence by video link by the two complainants would create a real risk that he would not get a fair trial because the giving of evidence by them by way of live video could or would convey to the jury that they were persons with mental impairment, a matter which he disputed as part of his defence. The High Court upheld his claim, holding that evidence by video link in the

circumstances carried with it a real risk of unfairness to the accused which probably could not be remedied by directions from the trial judge or statements from the prosecution. In the case, the prosecution applied for evidence to be given in this way under s. 13(1)(b) of the 1992 Act. Had the application been made under s.13(1)(a) of the 1992 Act; it would have involved a finding that both of the complainants suffered from a mental handicap. The only material put before the trial judge which expressly considered the ability of either complainant to give evidence were the statements of psychologists.

The defence objected on the grounds that it would create an inference that the complainants were vulnerable persons and persons who suffered from a mental impairment, if permitted to give evidence by way of video link. In essence, the defence argued that the issue of their mental impairment would be predetermined and would impinge on their client's right to a fair trial. The trial judge directed that the evidence should be given by video link under s.13(1)(b) of the 1992 Act. On appeal to the High Court, O'Neill J. overturned this decision. He stated⁹:

"In my judgment, it is clear that evidence by video link in the circumstances of this case does carry with it a real risk of unfairness to the accused person which probably cannot be remedied by directions from the trial judge or statements from the prosecution. Manifestly, s.13 of the Act of 1992 provides for the giving of evidence by video link for offences such as the ones the applicant is charged with. The discretion which the Court has under s.13(1)(b) to order evidence to be given in this way or to direct otherwise raises the difficult question as to how the Court is to achieve a correct balance between the accused's right to a fair trial and the prosecution's right in an appropriate case to have evidence given by video link. It is clear that what is required is a test that achieves the correct balance between these two competing rights."

He went on to note:¹⁰

"Where the Court reaches the conclusion that the giving of evidence in this way carries with it a serious risk of unfairness to the accused which

could not be corrected by an appropriate statement from the prosecution or direction from the trial judge, it should only permit the giving of evidence by video link where it was satisfied by evidence that a serious injustice would be done, in the sense of a significant impairment to the prosecution's case if evidence had to be given in the normal way, *viva voce*, thus necessitating evidence by video link in order to vindicate the right of the public to prosecute offences of this kind. The fact that the giving of evidence *viva voce* would be very unpleasant for the witness or coming to court to give evidence very inconvenient, would not be relevant factors."¹¹

Having established the test, O'Neill J. went on to hold that the trial judge did not achieve "the correct balance in this case between the right of the applicant to a fair trial and the right of the first named respondent to prosecute the offences in question on behalf of the public".¹²

Under s.14(1) of the 1992 Act, witnesses may, on an application by the prosecution or the defence, also be permitted to give evidence in court through an intermediary in circumstances where they are using the live television link and are under 18 years of age, or are persons with a "mental handicap" who have reached that age, in relation to a sexual offence or an offence involving violence. The trial judge can grant such an application if he or she believes that the interests of justice require that any questions to be put to the witness be put through an intermediary. Questions put to a witness in this manner shall be either in the words used by the questioner or so as to convey to the witness in a way which is appropriate to his or her age and mental condition the meaning of the questions being asked. While evidence is being given through a live television link pursuant to s.13(1) of the 1992 Act (except through an intermediary) neither the judge, nor the barrister or solicitor concerned in the examination of the witness, shall wear a wig or gown. Moreover, if a child or a person with a mental disorder is giving evidence via a television link in respect of a victim impact statement, the same rule applies.¹³

Given the emphasis placed by our adversarial system on the orality of the proceedings, pre-trial statements are not generally permitted in the criminal process. The rationale underpinning the exclusion of such statements is that they constitute hearsay and ordinarily are excluded because the court is deprived

of the normal methods of testing the credibility of the witness. A pre-trial statement, for example, is not given on oath; the demeanour of the witness making the statement cannot be observed by the trier of fact; and the defence has no opportunity to cross-examine the witness. The absence of this latter safeguard is of particular importance. More recently, however, it has been recognised that an overly rigid application of the hearsay rule can lead to injustice. Provision has accordingly been made for the admission of video recordings, depositions and out of court statements in certain circumstances.

Under s.16(1) of the 1992 Act, for example, it provides that a video recording of any evidence given by a person under 18 years of age or a person "with a mental handicap" through a live television link at the preliminary examination of a sexual offence or an offence involving violence shall be admissible at trial. It also renders admissible at trial a video recording of any statement made by a person under 14 years of age or a person with a "mental handicap" (being a person in respect of whom such a sexual offence or an offence involving violence is alleged to have been committed) during an interview with a member of the Garda Síochána or any other person who is competent for the purpose, provided the witness is available at trial for cross-examination. This provision is, as Delahunt notes, "undoubtedly a practical step towards making the testimony of child witnesses and witnesses with an intellectual disability more easily heard within the criminal justice system".¹⁴ In either case, the video recording shall not be admitted in evidence if the court is of opinion that it is not in the interests of justice to do so. In *People (DPP) v XY*, for example, the accused was charged with an offence under s.4 of the Criminal Law (Rape) (Amendment) Act 1990 after it was alleged that he forced a woman with an intellectual disability into performing the act of oral sex with him. In the case, the trial judge admitted as evidence a DVD recording of an interview with the complainant. This pre-trial recording was admitted as examination-in-chief testimony.¹⁵

In some instances, eye-witness identification of the perpetrators of crime will be required at the pre-trial and trial stages of criminal process. This can be very traumatic for witnesses, particularly those who are the alleged victims. There are no one-way mirror identification systems in Garda stations, and very often,

the victim may find himself or herself in the same room as the accused. Moreover, at a pre-trial identification parade, the witness will, according to the Garda Síochána's *Criminal Investigation Manual*, generally be asked to "place his/her hand on the identified person's shoulder" though fortunately it is now the case that this practice has been relaxed and the witness can, if he or she requests, make the identification by pointing to and describing the person in question.¹⁶ Making an identification in court can also be difficult for a witness. More recently, efforts have been made to alleviate this trauma. Persons giving evidence via television link under s.13 of the 1992 Act, for example, shall not now be required to identify the accused at the trial of the offence if the accused is known to them (unless the court in the interests of justice directs otherwise). Moreover, evidence by a person other than the witness, that the witness identified the accused as being the offender at an identification parade, shall be admissible as evidence.

The reduction of victim alienation has also occurred through the use of victim impact statements. Section 5 of the Criminal Justice Act 1993 made provision for the court to receive evidence or submissions concerning any effect of specified offences on the person in respect of whom an offence was committed. These offences relate to most sexual offences and to offences involving violence or the threat of violence to a person. Section 5 initially presupposed that the victims of these offences were capable themselves of giving evidence in open court of the impact that the crime had on them.¹⁷ Under s.5A of the Criminal Justice Act 1993, a child or a person with a mental disorder may now give evidence of the impact of the crime through a live television link unless the court sees good reason to the contrary.¹⁸ Moreover, where a child or a person with a mental disorder is giving evidence through a live television link pursuant to s.5A, the court may, on the application of the prosecution or the accused, direct that any questions be put to the witness through an intermediary (provided it is in the interests of justice to do so).¹⁹

The Irish criminal process ordinarily works off the assumption that all witnesses are competent to testify in court. If a dispute arises as to the competence of a particular witness, the party calling that witness bears the legal burden of proving that he or she is in fact competent. At common law, a witness demonstrates

competence by showing that he or she understands the nature of an oath and is capable of giving an intelligent account.²⁰ Testimony in civil and criminal proceedings normally requires that the evidence has to be given on oath or affirmation. As was noted in *Mapp v Gilhooley*, "the broad purpose of the rule is to ensure as far as possible that such *viva voce* evidence shall be true by the provision of a moral or religious and legal sanction against deliberate untruth".²¹

Persons deemed to have a mental impairment were traditionally excluded from giving evidence at trial. The common law, however, then altered and permitted such a witness to testify provided he or she was capable of understanding the nature and consequences of an oath, was capable of giving an intelligible account, and the mental disorder did not impede his or her ability to give evidence at trial.²² In *People (DPP) v JT*,²³ for example, the competence of a 20-year-old Down Syndrome complainant was considered by the court. The trial judge asked her certain questions to ascertain if she understood the meaning of the word "oath" to which she replied she did. She was then asked if she understood what it meant to tell the truth and she said she did. At that stage, the trial judge expressed himself satisfied and did not further question her and she was duly sworn. The testimony of the complainant was to the effect that she had been the victim of various sexual offences perpetrated upon her by her father. The applicant was convicted by a jury at the Circuit Court. One of the grounds in which the appellant sought to have his conviction set aside was that the trial judge had erred in allowing the complainant's testimony given that she was mentally impaired. This argument was rejected by the court.

In *People (DPP) v Gillane*,²⁴ it was held that it was permissible for a witness to give identification evidence for the prosecution in a case. This was despite the fact that he believed that staff at the Mater Hospital had inserted a microchip into his head. As the court noted, though the witness "had very strange ideas about what was done to him when he had an operation on his head some twenty years before in the Mater Hospital, [this] does not mean that he was incapable of giving evidence". If a witness has communicative difficulties, an interpreter may be provided to aid with the giving of evidence. Anatomical dolls were also used in the *JT* case to facilitate the complainant in

giving evidence.

If, however, a mentally impaired person was not able or permitted to give sworn evidence, there was no means by which unsworn evidence could be given. In *DPP v JS*,²⁵ for example, a moderately mentally impaired complainant could not answer questions as to the nature of the oath or the nature of a lie at trial. She made no response when asked by the judge what the moral and legal consequences of telling a lie were. In the result, she could not be sworn and, as there was no independent evidence in the case, a *nolle prosequi* was entered.²⁶ Similarly, in *DPP v MW*,²⁷ a moderately mentally impaired complainant alleged that she was raped in a car. The accused was charged with two counts, rape and unlawful carnal knowledge of a mentally impaired person. At the rape trial, the trial judge ruled that she was competent to take the oath. Her testimony at trial, however, was held to be contradictory and the judge directed an acquittal. Subsequently the accused was tried with the second count, unlawful carnal knowledge of a mentally impaired person. On this occasion, however, her preliminary answers on questions pertaining to the nature of an oath were less satisfactory, and the trial judge declined to have her sworn. As there was no independent evidence in the case, the prosecution was compelled to enter a *nolle prosequi*.²⁸

Section 27(3) of the 1992 Act now provides that the evidence of a person with a "mental handicap" may be received otherwise than on oath or affirmation if the court is satisfied that the person is capable of giving an intelligible account of events which are relevant to the proceedings. In *O'Sullivan v Hamill*,²⁹ O'Higgins C.J. noted:

"Unsworn evidence is provided for from a person with a mental handicap 'if the court is satisfied that he is capable of giving an intelligible account of events which are relevant to those proceedings'. In my view, before that section comes into play there are two requirements on which the court has to be satisfied - (1) that the person has a mental handicap, and (2) that he is capable of giving an intelligible account of events which are relevant to the proceedings. Clearly there must be an inquiry."

Determining the answers to these questions in that

inquiry at trial may require expert medical opinion evidence.

Over the years, the common law also devised particular corroboration rules in respect of certain categories of "suspect" witnesses such as sexual complainants, children, and accomplices. Ordinarily, an accused person in a criminal trial can be convicted on the testimony of one witness alone. However, for suspect witnesses such as those cited above, a warning of the dangers of convicting on such evidence in the absence of corroboration had to be given to the jury. In respect of witnesses with an intellectual disability, there is no statutory law requiring corroboration or that a corroboration warning be given. However, there is some case law support for the view that in the case of such witnesses, a warning should be given of the dangers of convicting on the testimony of such witnesses in the absence of corroborative evidence.³⁰ In Ireland, in *People (DPP) v MJM*,³¹ a trial judge invoked his discretion to give a warning under s.7 of the Criminal Law (Rape) (Amendment) Act 1990 in a sexual offences case, in part, based on the mental status of the complainant, and in particular the fact that she had a child-like mind. It should be noted, however, that the Law Reform Commission in Ireland suggested in 1990 that there should be no corroboration requirement in respect of persons with an intellectual disability.³²

Certain pieces of criminal law in Ireland make provision for the criminalisation of conduct which involves the exploitation of persons who are defined as "mentally impaired". Section 5 of the Criminal Law (Sexual Offences) Act 1993 (the "1993 Act") is one example of this, and provides that it is an offence to have sexual intercourse or commit an act of buggery with a person who is mentally impaired (other than a person to whom he is married or to whom he believes with reasonable cause he is married), or to attempt such offences. Section 5(2) goes on to state it is also an offence for a male person to commit or attempt to commit an act of gross indecency with another male person who is mentally impaired. For both offences, a defence is provided for an accused if he can show that at the time of the alleged commission of the offence he did not know and had no reason to suspect that the person in respect of whom he is charged was mentally impaired.

Whilst people with disabilities are subject to the

provisions of criminal law and laws pertaining to the evidence-giving process, other forms of legislation impact on the experiences of people with disabilities with the criminal justice system. For example, the Disability Act 2005 sets out obligations on public service providers, including the Gardaí and Courts Service, to provide information to people with disabilities in accessible formats, and also to make their premises accessible. Many courthouses, for example, have sought to make physical adjustments for people with disabilities, such as putting in wheelchair ramps and induction loop systems.

Continued Problems

Notwithstanding the increased recognition of victims in the Irish criminal process, it remains the case that some of the needs of victims continue to be unmet. A lack of knowledge among criminal justice agencies and actors about the needs of victims of crime is a key issue.³³ There are also many reported difficulties with the provision of information to victims.³⁴ Other issues that cause concern include underreporting;³⁵ intimidation by the process;³⁶ attrition rates;³⁷ the lack of private areas in courts;³⁸ difficulties with procedural rules and legal definitions (e.g. consent in rape cases);³⁹ delays in the system;⁴⁰ the lack of opportunity to participate fully in the criminal process; and inadequate support services.

Victims of crime with disabilities also experience these more general problems of underreporting, lack of information provision, lack of private areas in courtrooms, and delays in progressing complaints. Very often, however, the centrality of their outsider status of people with disabilities is also more pronounced in Ireland. This is evident in a number of areas in the criminal process including policy emphasis, the specific commitments given by criminal justice agencies to victims with disabilities, the requirements of the adversarial process, the issue of competency to testify, the criminalisation of conduct which involves the exploitation of persons with disabilities, the language employed by the criminal law, and service provision.

To begin with, the Victims Charter has marked an important policy development for crime victims in Ireland. This Charter was produced by the Department of Justice and Law Reform in September 1999. It

reflects the "commitment to giving victims of crime a central place in the criminal justice system". As such, it amalgamates for the first time "all the elements of the criminal justice system from the victim's perspective".⁴¹ Significantly, there is only one reference to victims with disabilities in the Charter. In the Garda section, a commitment is made as follows: "... if you have any form of disability we will take your special needs or requirements into account."⁴² The absence of a reference to victims with disabilities from any of the other criminal justice agencies in the non-binding Charter is significant, demonstrating their peripheral status at a policy level. A recent study undertaken on victims of crime with disabilities in Ireland also found that people with disabilities "are not being strategically identified as a victim group, either by victim support organisations, or by those engaged at a central government policy level in dealing with victims' issues".⁴³

Determining the competency of a witness to give an intelligible account also gives rise to significant difficulties. The intellectual disability organisation, Inclusion Ireland, has argued that many cases involving people with intellectual disabilities are failing to proceed because the victims are deemed incompetent either before, or when they reach, court.⁴⁴ In a recent case, the complainant, who has Down Syndrome, alleged that she was sexually assaulted at a 21st birthday party. The family claimed that shortly after the complainant was put to bed, a family member entered the bedroom and saw a man in bed with her. It was alleged that the complainant had most of her clothes removed and that the man was naked from the waist down. However, at trial, the complainant, who had "a mental age of four", was deemed incompetent to testify and the case was dismissed. The complainant's mother stated:

"She [the complainant] was brought into this room in the Central Criminal Court and asked questions about numbers and colours and days of the week which had no relevance in [her] mind. She knew that she had to go into a courtroom and tell a story so the bad man would be taken away. It was ridiculous. There is no one trained in Ireland to deal with someone similar to Laura, from the Gardaí up to the top judge in Ireland and the barristers and solicitors."⁴⁵

Delahunt makes a similar argument:

"It is submitted that the current test of competency is inadequate to deal with the needs of the vulnerable witness. It is arguable as to whether a judge is qualified to ascertain whether a witness with an intellectual disability is competent to act as a witness or whether he or she should be assisted by external information provided by a qualified person in respect of the relevant intellectual disability of the witness. Significant information may be lost to the trial if a witness is deemed incompetent when the witness may merely have a different vocabulary or expression in respect of what it means to tell the truth."⁴⁶

Elsewhere it has been noted that "the greatest impediment to accommodating complainants with mental disabilities lies in our assumptions about what is necessary to ensure a fair trial for an accused ... [A] more nuanced understanding of what a fair trial requires would facilitate a more effective utilisation of existing accommodations as well as the development of new ones".⁴⁷ In Ireland, Delahunt makes a similar point, suggesting that we continue to "endure a situation where our adversarial system risks imposing a secondary trauma on the complainant".⁴⁸ She went on to note:

"As the courts move towards pre-trial deposition, legislation is required which will take the vulnerable witness out of the trial process entirely by giving all of his or her evidence pre-trial. For the complainant, having his or her testimony deposed soon after the alleged incident will mean not having to endure the considerable delay waiting for the case to come to court ... We have legislation here which is 20 years out of date [referring to the 1992 Act], which is limited in respect of the offences to which it applies, which contains archaic, undefined terms, which does not provide statutory guidelines for Gardaí or courts to work within, and which does little to safeguard the interests of either the complainant or defendant."⁴⁹

More specifically, the adversarial process places a heavy emphasis on consistency and credibility of account. The observation of direct, unmediated

responses to questions is often crucial in this regard. Consistency of account, clear and rational recollection, accuracy as to detail, appearance and deportment, and poised expressions and body language are all important indicators of a witness's truthfulness and credibility in relation to determinations of fact. A failure along any or all of these lines either at reporting or trial stages may cast fatal doubt on the truthfulness of a witness's account, which ultimately will impact on decisions to prosecute and determinations of guilt. This foundational commitment to the reception and observation of unmediated *viva voce* testimony is grounded in the need to uphold the integrity of the adjudicative process and minimise the risk of misdecision. For victims with disabilities, however, it can be a significant discriminatory barrier, particularly for those, for example, who have difficulty with long-term memory recall, with communicating information, and with cognitive overload, or are vulnerable to questioning that invites suggestibility, acquiescence and compliance.⁵⁰ The interaction between criminal justice agencies and witnesses with disabilities can therefore reinforce traditional constructions of subordination and inferiority. As Benedet and Grant note:

"It is not unusual in cases involving complainants with mental disabilities to see inconsistencies in, or a certain amount of confusion regarding, some details of their testimony. Such inconsistencies might raise issues of credibility if the complainant did not have a disability. But in cases involving complainants with mental disabilities, trial judges should carefully examine the real significance of those inconsistencies to the legal issues at stake, with a view to understanding the essence of the complainant's testimony. In some cases, for example, the complainant may be easily influenced by the nature of the questions or may not fully understand them. Trial judges must be cautious not to dismiss too easily all of the complainant's testimony because some of the details may be unreliable."⁵¹

There is also evidence that crimes against people with disabilities are reported at a much lower rate than for the general population.⁵² Bartlett and Mears, for example, recently analysed Rape Crisis Network

Ireland data on incidents of sexual abuse, disclosed by people with disabilities between 2008 and 2010. They also conducted an online survey of people with disabilities. They identified a number of problems including dissatisfaction with professional services such as those provided by the Gardaí and difficulties of accessing general services. In particular, they estimated that 66 per cent of persons with disabilities who suffered sexual violence and attended Rape Crisis Centres in Ireland between 2008 and 2010 did not report the abuse to a formal authority.

There are also a number of difficulties with the offences that criminalise conduct which involves the exploitation of people who are defined as "mentally impaired". To begin with, it has been suggested that it is not appropriate to use the term "mentally impaired" to describe persons with disabilities.⁵³ The Law Reform Commission also noted in a Consultation Paper on capacity that:

"... a regrettable effect of s.5 of the 1993 Act is that, outside a marriage context, a sexual relationship between two 'mentally impaired' persons may constitute a criminal offence because there is no provision for consent as a defence in respect of a relationship between adults who were both capable of giving a real consent to sexual intercourse."⁵⁴

The Commission went on to note that this may in fact breach art.8 of the European Convention on Human Rights in relation to respect for private life.⁵⁵ There is also an evident gap in the provision in that it covers buggery, intercourse and acts of gross indecency between males, but not unwanted sexual contact more generally.

In *People (DPP) v XY*, the accused was charged with s.4 of the Criminal Law (Rape) (Amendment) Act 1990 after it was alleged that he forced a woman with an intellectual disability into performing the act of oral sex with him. Such a sexual act did not come within the scope of s.5 of the 1993 Act. On this issue, White J. in the case noted that "[i]t seems to me that the Oireachtas when they introduced the 1993 Act did not fully appreciate the range of offences needed to give protection to the vulnerable".⁵⁶ Given the lack of evidence of an assault or hostile act on the part of the accused, the trial judge directed the jury to acquit the

defendant, stating that the judiciary could not fill a "lacuna in the law".⁵⁷

A recent Law Reform Commission *Consultation Paper on Sexual Offences and Capacity* contains a detailed review of the current law on sexual offences involving persons with a disability. It provisionally recommended that s.5 of the 1993 Act should be repealed and replaced.⁵⁸ In its place, it recommends that any "replacement of s.5 of the Criminal Law (Sexual Offences) Act 1993 should cover all forms of sexual acts including sexual offences which are non-penetrative and sexual acts which exploit a person's vulnerability".⁵⁹ It also "recommends that there should be a strict liability offence for sexual acts committed by a person who is in a position of trust or authority with another person who has an intellectual disability".⁶⁰

There are also notable absences in the protection of people with disabilities in other relevant pieces of legislation. For example, under the Prohibition of Incitement to Hatred Act 1989, it is an offence to incite hatred against a group of persons in the State or elsewhere on account of their race, colour, nationality, religion, ethnic or national origins, or membership of the travelling community or sexual orientation. Significantly, no mention is made of disability as a criterion in this piece of legislation.⁶¹

It is also the case that disability may be viewed as an aggravating factor at sentencing stage when assessing the gravity of an offence in which a person with a disability has been a victim. Standard aggravating factors include the use of excessive force, particularly degrading or dehumanising behaviour, breach of trust and so on. Though there is little jurisprudence on the area, there is no reason why a sentencing judge in Ireland could not regard the fact that the crime was committed against a person with a disability as an aggravating factor. In England and Wales, such a viewpoint is made explicit through the enactment of s.146 of the Criminal Justice Act 2003. This imposes a duty on courts to increase the sentence for any offences aggravated by hostility based on the victim's disability or presumed disability. Such "hate crime" legislation emerged in part in response to a series of high profile murders of people with intellectual disabilities and a campaign mounted by disability organisations. The implementation of such legislation, as well as providing greater protection from hostility and harassment for people with disabilities,

also provides a source of information on the extent of such hostility against people with disabilities, as disability hate crime cases prosecuted under this law are recorded for statistical purposes.

Conclusion

Victims of crime are being anchored once again as stakeholders in the Irish criminal process, and criminal justice agencies are having to factor them in to their decision-making processes. Victims of crime with disabilities have benefitted from this more general inclusionary momentum and have witnessed specific improvements inter alia in relation to television-link evidence, the use of intermediaries, video-recorded evidence, identification practices, victim impact statements, the reception of unsworn evidence, and the criminal laws protecting them. If one peers behind this inclusionary veil, however, the outsider status of victims of crime with disabilities quickly reveals itself. The criminal justice system, to the extent that it accommodates victims of crime, remains epistemically rooted in mainstream accounts of victims' needs and concerns. Such victims fit more easily within an adversarial paradigm of justice that emphasises orality, lawyer-led questioning, observation of the demeanour of a witness, the curtailment of free-flowing witness narrative, confrontation and robust cross-examination. Victims of crime with disabilities remain largely invisible, not least because of the difficulties they pose in relation to information gathering and fact finding for the adversarial model of justice. A commitment to reform is hampered as much by a misconceived fidelity to the conventional way of doing things and a reluctance to overly disturb familiar and reified patterns as it is by concerns over the potential for injustice – indeed there is no empirical evidence that an adversarial model is the best means of reaching the truth or ensuring fairness in all instances.

The marginality of victims of crime with disabilities reveals itself in many areas of the Irish criminal process. At a policy level, victims of crime with disabilities are not strategically identified as a specific victim group with particular needs and concerns among criminal justice agencies and victim support organisations. In terms of criminal justice agency commitments, no structured and continuous enhanced service mechanism is provided to such victims—

whose quality of evidence may be reduced because of the disability—as they pass through investigative, prosecutorial and trial stages of the process. In some instances, the procedural and substantive rules are also inadequate having regard to the social and medical realities of such victims' lives. This is evident in the static, somewhat fixed, approach to competency to testify determinations, an overly narrow emphasis on the adversarial process, and a lack of suitable protections in the criminal law calendar.

The Irish criminal process should ensure, as far as is possible, that it does not eclipse the personal agency of victims of crime with disabilities. Assumptions about a victim's capability can compound preconceptions among criminal justice professionals at all levels of the system, from Gardaí to members of the judiciary. There is an onus on all agencies to strategically identify victims with disabilities as a category of the broader victim constituency, and to develop a professional rubric which seeks to meet their communicative, social, mobility, emotional, and other requirements, as befits an equitable, accessible justice process.

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² Christie, "Conflicts as Property" (1977) 17 Brit. J. Criminol. 1
³ (COD, 2011, 0129).

⁴ See Law Reform Commission, *Consultation Paper on Child Sexual Abuse* (Dublin: Law Reform Commission, 1989), pp.120–121. Delahunt argues that the confinement of this support measure to specified sexual or violent crimes is unnecessarily restrictive. See Delahunt, "Issues in Respect of Support Measures for Witnesses with an Intellectual Disability in the Irish Criminal Justice System", *Creating Equitable access to Justice: Recognising People with Disabilities as Victims of Crime Conference*, UCC, Cork May, 3 and 4, 2012.

⁵ The Criminal Evidence Act 1992 originally set this age at "under 17", but this was amended by s.257(3) of the Children Act 2001.

⁶ [1998] 1 I.R. 321.

⁷ [1995] 1 I.R. 268.

⁸ [2010] 2 I.R. 605.

⁹ [2010] 2 I.R. 605 at 612–613.

¹⁰ [2010] 2 I.R. 605 at 613.

¹¹ See also *DPP v McManus* [2011] IECCA 32.

¹² [2010] 2 I.R. 605 at 613.

¹³ See s.5 of the Criminal Procedure Act 2010.

¹⁴ Delahunt, "Video evidence and s.16(1)(b) of the Criminal Evidence Act 1992" (2011) 16 *Bar Review* 1 at 6.

¹⁵ As referenced in Law Reform Commission, *Sexual Offences and Capacity to Consent: Consultation Paper* (LRC CP 63–2011) (Dublin: Law Reform Commission, 2011), para.6.28. See also, Delahunt, "Improved Measures needed for vulnerable witnesses in court", *The Irish Times*, December 7, 2010, p.24. More general provision for the admission of depositions (and video recordings) at the pre-trial stage are now made under s.4G of the Criminal Procedure Act 1967, as amended. Moreover, under s.255 of the Children Act 2001, a judge of the District Court, when satisfied on the evidence of a registered medical practitioner that the attendance before a court of any child would involve serious danger to the safety, health or wellbeing of the child, may take the evidence of the child concerned by way of sworn deposition or through a live television link in any case where the evidence is to be given through such a link. Part 3 of the Criminal Justice Act 2006 also makes provision for the admission of a statement made by a witness in any criminal proceedings relating to an arrestable offence. It can be invoked either by the prosecution or the defence. It can occur in circumstances where the witness, although available for cross-examination, refuses to give evidence, denies making the statement, or gives evidence which is materially consistent with it. See also, *DPP v O'Brien* [2011] 1 I.R. 273.

¹⁶ As quoted in Walsh, *Criminal Procedure* (Dublin: Thomson Round Hall, 2002), para.6.55.

¹⁷ To combat the narrowness of this presumption, the Irish courts began as a practice to admit the evidence of family members of homicide victims as witnessed in *DPP v O'Donoghue* [2007] 2 I.R. 336. As a result of the introduction of s.4 of the Criminal Procedure Act 2010, a "person in respect of whom the offence was committed" now includes a family member of that person when that person has died, is ill or is otherwise incapacitated as a result of the commission of the offence. A family member may also give evidence under s.5(3)(b)(ii) of the Criminal Justice Act 1993, as amended, where the victim of the specified offence suffers from a mental disorder (not related to the commission of the offence).

¹⁸ Provision is also made for any other witness, with leave of the court, to give victim impact evidence via a television link.

¹⁹ Section 5B of the Criminal Justice Act 1993, as inserted by s.6 of the Criminal Procedure Act 2010.

²⁰ The determination as to whether a child understands the nature and consequences of an oath is one for the trial judge. See *AG v O'Sullivan* [1930] I.R. 553.

²¹ [1991] I.R. 253.

²² See *R. v Hill* (1851) 2 Den 254.

²³ (1988) 3 Frewen 141.

²⁴ Unreported, Court of Criminal Appeal, December 14, 1998.

²⁵ Unreported, Circuit Court, 1983.

²⁶ Law Reform Commission, *Report on Sexual Offences Against the Mentally Handicapped* (LRC 34-1990) (Dublin: Law Reform Commission, 1990), p.10.

²⁷ Unreported, Circuit Court, 1983.

²⁸ Above, fn.26 at p.10.

²⁹ [1999] 3 I.R. 9.

³⁰ See, for example, the Australian case of *Bromley v R.* (1986) 161 C.L.R. 315.

³¹ Unreported, Court of Criminal Appeal, July 28, 1995.

³² Above, fn.26 at p.24.

³³ See McGrath, "The Living Victims of Homicide: analysing the needs and concerns of the co-victims of homicide within the Irish criminal justice system" (Unpublished PhD thesis, UCC, 2009).

³⁴ See European Commission, *Report from the Commission on the basis of art. 18 of the Council Framework Decision of March 15, 2001 on the Standing of Victims in Criminal Proceedings* (Strasbourg, SEC 2004), p.5; Irish Council for Civil Liberties, *A Better Deal: the human rights of victims in the criminal justice system* (Dublin: ICCL, 2008), p.21; McGee et al, *The SAVI Report: Sexual Abuse and Violence in Ireland* (Dublin: Liffey Press, 2002).

³⁵ Central Statistics Office, *Quarterly National Household Survey 2006: Crime Victimisation* (CSO: Cork and Dublin, 2007); O'Connell and Whelan, "Crime Victimisation in Dublin" (1994) 4(1) I.C.L.J. 4(1) 85.

³⁶ Kelleher and O'Connor, *Making the Links: Towards an Integrated System for the elimination of violence against women in intimate relationships with men* (Dublin: Women's Aid, 1999).

³⁷ Hanly et al, *Rape and Justice in Ireland: a national study of survivor, prosecutor and court responses to rape* (Dublin: Liffey Press, 2009); O'Mahony, "Ireland" in Lovett and Kelly (eds), *Different Systems, similar outcomes? Tracking attrition in reported rape cases in eleven European countries* (London: Child and Woman Abuse Unit, 2009).

³⁸ Kilcommins et al, *The Needs and Concerns of Victims of Crime in Ireland* (Dublin: Commission for the Support of Victims of Crime, 2010).

³⁹ Bacik et al, *The Legal Process and Victims of Rape* (Dublin: Dublin Rape Crisis Centre, 1998).

⁴⁰ Hanly et al, *Rape and Justice in Ireland: a national study of survivor, prosecutor and court responses to rape* (Dublin: Liffey Press, 2009).

- ⁴¹ Department of Justice, *Victims Charter and Guide to the Criminal Justice System*. (Dublin: Department of Justice, 1999), p.3. In 2005, a review of the entire Charter was undertaken by the Commission for the Support of Victims of Crime and in 2010 a revised *Victim's Charter and Guide to the Criminal Justice System* was produced. This attempts to increase the information available to victims of crime from the Crime Victims Helpline, the Gardaí, the Courts Service, the Director of Public Prosecutions, the Prison Service, the Probation Service, the Legal Aid Board, the Coroner's Service and the Criminal Injuries Compensation Tribunal. It sets out the entitlements a victim has from these various services, but it does not confer legal rights.
- ⁴² Department of Justice and Law Reform, *Victims Charter and Guide to the Criminal Justice System* (Dublin: Victims of Crime Office, Department of Justice and Law Reform, 2010), p.17. In contrast, the *Code of Practice for Victims of Crime in England and Wales*, which has lawful authority, specifically provides an enhanced service for vulnerable victims by all relevant criminal justice agencies. A vulnerable victim includes a "person suffering from a mental disorder or otherwise has a significant impairment of intelligence and social functioning, or has a physical disability or is suffering from a physical disorder". See Office for Criminal Justice Reform, *The Code of Practice for Victims of Crime* (London: Office for Criminal Justice Reform, 2005), p.4.
- ⁴³ Edwards et al, *Access to Justice for People with Disabilities as Victims of Crime in Ireland* (UCC, Cork, 2012), p.100.
- ⁴⁴ Inclusion Ireland "Access to justice for People with a Disability hampered by antiquated law" (2011). Available at <http://www.inclusionireland.ie/ACCESSTOJUSTICEFORPEOPLEWITHADISABILITYHAMPEREDBYANTIQUATEDLAW.htm>
- ⁴⁵ McEnroe, "Family want 'archaic' law overhauled", *Irish Examiner*, March 30, 2010.
- ⁴⁶ Delahunt, "Issues in Respect of Support Measures for Witnesses with an Intellectual Disability in the Irish Criminal Justice System", Creating Equitable access to Justice: Recognising People with Disabilities as Victims of Crime Conference, UCC, Cork, May 3 and 4, 2012.
- ⁴⁷ Benedet and Grant, "Hearing the Sexual Assault Complaints of Women with Mental Disabilities: Evidentiary and Procedural Issues", (2007) M.C.G.L. 515 at 547.
- ⁴⁸ Delahunt, "Improved measures needed for vulnerable witnesses in court", *The Irish Times*, December 7, 2010, p.24.
- ⁴⁹ Delahunt, "Improved measures needed for vulnerable witnesses in court", *The Irish Times*, December 7, 2010, p.24.
- ⁵⁰ Kebbell et al, "Witnesses with Intellectual Disabilities in Court: What questions are asked and what influence do they have?" (2004) 9 Leg. Crim. Psychol. 23–35. See also Sanders et al, *Victims with Learning Disabilities: negotiating the criminal justice system (findings no 44)* (London: HMSO, 1996).
- ⁵¹ Benedet and Grant, "Hearing the Sexual Assault Complaints of Women with Mental Disabilities: Evidentiary and Procedural Issues", (2007) M.C.G.L. 515 at 542.
- ⁵² See Wilson and Brewer, "The Incidence of Criminal Victimization of individuals with an intellectual disability" (1992) 27(2) Aust. Psychol. 114–117; Petersilia, "Crime Victims with Developmental Disabilities" 28 Crim. Justice Behav. 655.
- ⁵³ Law Reform Commission, *Vulnerable Adults and the Law*. (LRC 83–2006) (Dublin: Law Reform Commission, 2006). By the same reasoning, the use of the phrase "mental handicap" in the Criminal Evidence Act 1992 is also inappropriate.
- ⁵⁴ Law Reform Commission, *Consultation Paper on Vulnerable Adults and the Law: Capacity* (Dublin: Law Reform Commission, 2005), p.141.
- ⁵⁵ Above, fn.54 at p.143.
- ⁵⁶ As quoted in Law Reform Commission, *Sexual Offences and Capacity to Consent: Consultation Paper 2011*. (LRC CP 63–2011), (Dublin: Law Reform Commission, 2011), p.191.
- ⁵⁷ Above, fn.56 at p.192.
- ⁵⁸ Above, fn.56 at p.179.
- ⁵⁹ Above, fn.56 at p.180.
- ⁶⁰ Above, fn.56 at p.179.
- ⁶¹ The lack of recognition of vulnerable witnesses has also been identified in Ireland. In December 2007, Bacik et al noted: "Specific provision should be made ... for vulnerable and intimidated victims. A specific definition should be developed for each category and a statement of the additional supports which are to be made available to such victims. Useful models for such supports may be found in other jurisdictions ... The creation of a statutory definition of vulnerable and intimidated witnesses should be considered, as well as guidelines on the identification of intimidated and vulnerable witnesses and measures to provide protection and reassurance to intimidated witnesses ... Guidelines should be issued in order to ensure that appropriate interview methods are used in respect of vulnerable or intimidated witnesses, and providing for a full range of investigative and pre-trial support measures." (*Report on Services and Legislation Providing Support for Victims of Crime* (Dublin: Commission for the Support of Victims of Crime, 2007), pp.10–11).